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No. 8075

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

County of San Joaquin, State of California,
Appellant,

vs.

Edward F. Harris, Receiver of the Harris Harvester Company (a corporation), et al.,
Appellee.

BRIEF FOR APPELLEE, EDWARD F. HARRIS, AS RECEIVER.

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BRIEF FOR APPELLEE, EDWARD F. HARRIS, AS RECEIVER.

STATEMENT OF FACTS.

Respondent, Edward F. Harris, was appointed receiver of the assets of Harris Harvester Company under a bill in equity containing the usual allegations for the appointment of a receiver to conserve the assets and business of a financially embarrassed corporation, the bill being filed by one of the creditors and the Company having consented to the receivership.

The receivership is one for the conduct of the business of a financially embarrassed corporation; not for the liquidation of its affairs.

Paragraphs 4 and 5 of the order of appointment (Trans. p. 2) stipulate that the receiver shall be au-

thorized "to conduct the business of said defendant, and to sell all and singular its present and/or future stock in trade", etc., and upon the further order of the Court to sell any of its other assets. Paragraph 5 authorizes the receiver to purchase such materials and employ such labor as may be necessary to complete the stock of parts of the Company to meet demands for cash sales for the current season, but expressly eliminates authority for the receiver to engage in other manufacturing operations without further order of the court.

On May 29, 1931, the court made its order requiring the filing of claims on or before August 31, 1931 (Trans. pp. 21, 22).

On September 12, 1934, the receiver asked authorization to pay a dividend of 20% on unsecured merchandise claims arising before the receivership and commissions earned by agents prior to the receivership in an aggregate sum of approximately $46,000.00, and being a dividend of less than $10,000.00 (Trans. pp. 22, 23). Therefore, the total sum to be disbursed under this order is less than $10,000.00, aside from allowances to the trustee and his attorneys and a payment of $5899.07 to Harris & Mitchell, who furnished parts to the receiver for the conduct of the corporate business under express order of the court.

No claim by the County of San Joaquin was filed under the order directing the presentation of claims on or before August 31, 1931. The first suggestion by the County that taxes were claimed by it, either as general creditor or under a preferential right, was

the presentation of the claim which appears in the transcript, in open court on November 5, 1934, at the hearing of the receiver's petition for authorization to pay a dividend.

Sufficient evidence was introduced to sustain those portions of the order of the lower court directing payment of receiver's fees, attorney's fees and the payment to Harris & Mitchell above mentioned (Trans. p. 29).

It appeared that on the first Monday of March of each of the tax years covered by the County's claim, the Company owned real estate in San Joaquin County, being the real estate covered by the bond issue, and also being the real estate described in the affidavit of Edward F. Harris which appears at transcript page 33 (Trans. p. 29). Under the California statutes the taxes for each tax year (running from July 1st) become a lien on the first Monday of March next preceding.

This real estate was subject to a bond issue under which American Trust Company is trustee, securing payment of bonds in the original aggregate principal sum of $250,000.00, and of which $102,500.00 remained outstanding at the time of the receivership (Trans. p. 30). The trustee applied for and received permission to foreclose this deed of trust. In its petition it recites, among other things, that "the delinquent taxes on the property therein described" consist of various named amounts, being an enumeration of San Joaquin County taxes from 1929-30 to 1932-33, and including all except the last two years' taxes which are

covered by the County's present claim (Trans. pp. 30, 31). These last two years' taxes accrued following the filing of the petition and amount to only about $1000.00 (Trans. p. 36). The petition further alleges the insufficiency of the property to satisfy the unpaid bonds and coupons and the unpaid taxes (Trans. p. 31). Upon this showing the lower court made its order authorizing the foreclosure of the deed of trust. At the foreclosure sale this security, which included the Company's real estate with its buildings, equipment and machinery, and which originally was taken as security for a principal indebtedness of $250,000.00, was purchased by the bondholders for $5000.00, the greater portion of which was represented by endorsement of credit upon the outstanding bonds (Trans. p. 32). Necessarily this sale was subject to the tax lien on real estate which is granted by California law, and which is superior to pre-existing contract liens.

This brings us to the meat of the appeal. There are two companion appeals from the order directing payment of the dividend in question. One is the present appeal and the other is that of the American Trust Company as trustee under the bond issue (No. 8076). All of the other creditors, both numerous in number and many of them large in amount, were content with the order.

The bondholders purchased this property at the foreclosure sale subject to the tax lien, and if the taxes are collected as a preferred claim in the receivership in lieu of enforcing the tax lien upon the real

estate, the profit is that of the bondholders and not of the County. As a result, the prosecution of the present appeal is primarily for the benefit of the only other appellant, the American Trust Company as purported representative of the bondholders. If this appeal is successful, the bondholders get the property for $5000.00 instead of at a price of $5000.00 plus taxes, which was the basis upon which the sale was made. It was upon this same basis of the lien for these taxes against the real estate that the petition for authorization to foreclose was presented to the lower court, pursuant to which permission for foreclosure was granted. The affidavit of the receiver which was presented in evidence, and which is uncontradicted, establishes the value of this property for immediate quick sale at the time of the foreclosure as a sum in excess of $50,000.00 (Trans. pp. 33-35). Whatever the value of the supervisors' resolution may have as a statutory basis for the prosecution of a suit to recover taxes, it has no *evidentiary* value in the face of this direct evidence and the finding of the lower court that the purchase price at the foreclosure sale was greatly less than the actual value of the property at that time.

Moreover, the County is in the anomalous position of seeking to enforce a claim which has been paid at least in part. It was conceded by counsel for the County in the lower court that the taxes were a lien upon the real estate and that a portion of the taxes have been paid (Trans. p. 45). There was no attempt by the County to show the amount of the unpaid portion of the taxes. The County, therefore, seeks to

prosecute a preferred claim for taxes which have been paid in part, and the unpaid amount of which the County fails to state. The admission of payment is coupled with a statement that it was made under protest and that a claim for refund has been filed, but that the claim was denied by the supervisors (Trans. p. 45). It was also the contention of counsel for the County in the lower court that the taxes were a valid lien superior to the bond issue (Trans p. 46).

Conforming to the admittedly partially paid status of these taxes, the claim, as presented, noticeably fails to allege non-payment. In all of the supporting affidavits, it is stated that the receiver and Harris Harvester Company, respectively, "is indebted" to the County for specified taxes, and "that there are no just claims, deductions or offsets due from said County", but there is no statement of non-payment (Trans. pp. 37-40).

The court's order directing the receiver to make the payments in question recites:

> (a) That the receivership was instituted and prosecuted for the purpose of conducting and preserving the business of the defendant, and not for the purpose of liquidation; and
>
> (b) That the dividend ordered paid is a just and equitable exercise of discretion upon the part of the receiver and the court in the conduct of the business under the receivership; and
>
> (c) That no payments have been made on any of the claims for which a dividend is authorized, and that the claimants throughout the receiver-

ship have refrained from embarrassing the receiver in the conduct of the business, and from pressing their claims through bankruptcy or otherwise; and

(d) That all of the secured creditors have received payments in the course of the receivership; and

(e) That the bondholders acquired the Company's plant and equipment with the real estate upon which it is located at a nominal price, and for a sum greatly less than the actual value at the time of foreclosure (Trans. pp. 50, 51).

POINTS.

The receiver occupies a somewhat anomalous position upon this appeal. As an officer of the court he owes no greater duty to one creditor than to another, whether secured or unsecured. He has no personal interest in the present appeal. He is not only receiver, but also a general creditor of the Company for a substantial amount; notwithstanding that fact he recommended a dividend from which his own claim is excluded. His stockholder's interest in the Company is nominal; the Company takes its name from another "Harris", to whom the receiver is not related. Nevertheless, no other respondent appears upon the appeal, and the action of the lower court will go undefended and unexplained in the absence of a brief by the receiver. Under these circumstances, it seems appropriate for the receiver to dispassionately present his

views regarding the points urged by the appellant and, so far as he is able, to explain the grounds upon which the lower court exercised its discretion as detailed in the order which directed the payment of a dividend and rejected the claim of the County to a preferential lien for taxes against general assets. The discussion will be arranged under the following headings:

1. The County has not shown the amount of unpaid taxes, and it cannot twice collect the same taxes.

2. Enforcement of personal liability for taxes in this receivership is inequitable.

3. Under California law, there is no general prerogative lien securing payment of personal property taxes.

4. Taxes assessed during receivership are not a receivership expense.

5. Claim for taxes accruing prior to the receivership are barred by the statute of limitations.

6. The bar order of the District Court precludes the collection of taxes which are not an expense of the receivership.

ARGUMENT.

I.

THE COUNTY HAS NOT SHOWN THE AMOUNT OF UNPAID TAXES AND IT CANNOT TWICE COLLECT THE SAME TAXES.

This point is largely covered by the recitals in the statement of facts. It was admitted by counsel for the County at the hearing in the lower court that a part of these taxes had been paid by the owners of the real estate prior to the presentation of the claim in litigation. The fact that payment may have been coupled with a protest or claim for refund which has been rejected by the Board, or that suits for refund are pending, cannot change the fact that payment was made and accepted. There is nothing in the record to indicate that the taxes are not a valid first lien on the real estate, and counsel for the County themselves stated in the lower court that they believed the lien to be valid. Having voluntarily accepted this payment, the County is not in a position to prosecute a claim for payment a second time in the receivership proceedings.

There can be no question under California statutes and decisions that the claim for the taxes is a lien superior to pre-existing contract liens.

> *Political Code*, Sec. 3717;
>
> *Calif. Loan & Trust Co. v. Weis*, 118 Cal. 489.

This was statute and judicial law in California long before the execution of the present bond issue and its supporting deed of trust. Independently of the numerous authorities supporting the right of a State to

impose tax liens, it is also true in the present case that the bond issue must be deemed to have been issued and the bonds accepted in view of existing law.

The County having been already paid an unspecified portion of these taxes, now seeks to collect them in full as a preferred claim in the receivership from general assets, and in preference to general creditors. If the County is successful on this appeal and also is correct in its contention that a valid real estate lien exists for payment of the taxes, the County not only collects but retains double payment. If the taxes were a valid lien upon the real estate at the time of payment, no protest will permit the taxpayer to recover the amount so paid; we know of no procedure short of collusion which will enable the County to refund tax payments thus validly collected by it prior to the presentation of the claim under discussion.

The County has also failed to show the amount of taxes now unpaid and there is before the court no proper claim.

II.

ENFORCEMENT OF PERSONAL LIABILITY FOR TAXES IN THIS RECEIVERSHIP IS INEQUITABLE.

The situation recited under Point I illustrates in part the motives which animated the judge of the lower court to exercise his discretion by refusing payment of these taxes as a preferred personal liability against general assets.

This is a receivership for the purpose of conducting a business, not for the liquidation of the Company and its assets. The receiver, as the operator of a going concern, must, subject to the control of the court, be allowed reasonable latitude in the conduct of that business and the payment of its obligations. The exercise of sound discretion by the court may be controlled by general principles of equity, except that a specific statutory lien for taxes necessarily cannot be disregarded.

Another factor which appeals to sound discretion is that if this claim is allowed, either one of two results will follow:

(a) If the statutory lien on real estate is valid, the County, after collecting taxes upon the strength of that lien, will again collect from the receiver, and thus will be doubly paid to the extent that the owner already has paid the amounts. It cannot be presumed that the County will collusively repay to the owner money which was rightfully accepted in payment of taxes at a time prior to the presentation of the receivership claim. This was the original payment and because the County successfully collects the money a second time, does not entitle the property owner to a refund of his money; or

(b) If the tax payments made by the owner are refunded, the owner and not the County will be the complete beneficiary of the preferential payment made in this proceeding. Even if the County does not refund the amounts already paid by the owner, the owner and not the County will be the beneficiary of the preferen-

impose tax liens, it is also true in the present case that the bond issue must be deemed to have been issued and the bonds accepted in view of existing law.

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(b) If the tax payments made by the owner are refunded, the owner and not the County will be the complete beneficiary of the preferential payment made in this proceeding. Even if the County does not refund the amounts already paid by the owner, the owner and not the County will be the beneficiary of the preferen-

tial payment made in this proceeding, to the extent that the taxes remain unpaid; although the application for permission to foreclose was made upon the basis that these taxes constituted a lien upon the land, and the court granted permission to foreclose upon that basis, and the bondholders acquired title at the foreclosure sale upon that assumption. A situation in which the sole beneficiary of the preferential payment in the receivership is the purchaser at that sale, does not appeal to the conscience of a court of equity. The general creditors are deprived of the amount of these taxes in order that the purchaser at this foreclosure sale may acquire title to the property at a cost to that extent less than he assumed he was paying. The purchaser at that sale was the representative of these same bondholders who obtained authority from the court to conduct the foreclosure upon a showing that these taxes constituted a lien. What bids might have been made by third parties for the property at this foreclosure in the absence of a showing of the tax lien, no man can say. The situation is further emphasized by the fact that the purchaser acquired for $5000.00 property which originally constituted security for $250,000.00, and property which according to the undisputed testimony of the receiver was actually worth for immediate and quick sale more than $50,000.00. To add to that bargain by removing the tax burden through indirection and the assertion of personal liability under the County's claim, is unconscionable.

It is the ordinary rule in equity that the holder of a lien must exhaust his security before he enforces per-

sonal liability. As regards collection right for State taxes, and as repeatedly illustrated by cases cited in appellant's brief, California rules control the collection of taxes, the liens therefor and the enforcement of personal liability, if any. The equitable necessity in California of exhausting security before enforcing personal liability is well illustrated by a recent case in which the long disputed point was settled that the holder of indebtedness secured by deed of trust must exhaust his security before enforcing personal liability, notwithstanding the absence of statutory rule in California requiring such exhaustion of security, and notwithstanding a specific statutory provision for exhaustion of security in the case of mortgages, as distinguished from deeds of trust.

Bank of Italy v. Bentley, 217 Cal. 644.

Personal liability for these taxes may exist as a personal liability exists for the payment of a mortgage debt, but in this equitable receivership we contend that it was the exercise of sound discretion on the part of the Chancellor to decline to enforce the personal liability until the security was exhausted.

In a receivership for the conduct of a going business the County claims (1) that even so small a disbursement as $10,000.00 cannot be made without first paying the taxes for which the County holds real estate security, and (2) that the receiver must pay these taxes before he can even pay the bill of Harris & Mitchell for merchandise which he purchased as receiver and used in conducting the Company business under the receivership. This in effect is the assertion of a general

tax lien against all assets, both real and personal, notwithstanding the fact that the policy of California as found in its legislative enactment, is that the taxes shall be a lien upon real estate, with no provision for a lien against personal property.

Appellant relies upon Statutes of 1903, Chapter 119 (amended Statutes of 1919, Chapter 243) and the Supervisors' resolution passed pursuant thereto. This statute provides that if in the judgment of the Board of Supervisors, real estate security is insufficient, the County "may sue in its own name for the recovery of any and all moneys due", etc. The presentation of this claim is not a suit. The entire tenor of the statute indicates that it is intended to authorize "suits" as such. Such a statute should be strictly construed where by arbitrary action of the Board personal suit may be brought for the recovery of taxes notwithstanding the fact that they are a lien upon real estate which according to the uncontradicted testimony in this case is worth several times the amount of the taxes.

Political Code 3717 provides that personal property taxes shall be "a lien upon the real property of the owner thereof", but makes no provision for any lien upon personal property, nor do we find any other statutory provision creating liens for personal property taxes. In this connection see *Clark on Receivers*, Sec. 679, and particularly the following language:

> "The appointment of a receiver does not change the secured creditors' legal contracts. However, the court appointing the receiver *has control of the property in its hands for distribution.* It can-

> not say to the creditor 'We shall pay you part of your debt and we shall release the debtor from the balance of the claim' as a court of bankruptcy can say. But the equity court appointing the receiver says to the same creditor 'You must first realize on your collaterals and if you do so you *may* still have a claim against the defendant.' "

At a later point in the brief we shall urge that personal liability for taxes accruing prior to the receivership is barred by the statute of limitations; and that no personal liability for taxes accruing after the receivership attaches to the receiver, not only for the reason that they are a lien upon real estate, but also because they were not assessed to the receiver in accordance with the requirements of the California statute.

III.

UNDER CALIFORNIA LAW, THERE IS NO GENERAL PREROGATIVE LIEN SECURING PAYMENT OF PERSONAL PROPERTY TAXES.

Whether and to what extent a superior or other lien for State taxes exists is a matter of local law; to determine the extent of liens for personal property taxes and their priority, if any, resort must be had to the law of California.

> "Whether the priority of a state over other unsecured creditors in payment of debts due the state out of the assets of the debtor is a prerogative right or merely a rule of administration is a matter of local law, and the decision of the highest

court of the state as to the existence of the right and its incidents will be accepted by the Federal Supreme Court as conclusive."

Marshall v. New York, 254 U. S. 380, 65 L. Ed. 315 (syl. 1).

There is no provision in California law for priority of personal liability for taxes, nor do we find any decision upholding priority under prerogative right except as priority is granted by the statute.

Section 3717 of the Political Code contains the statutory grant of priority lien for personal property taxes and reads as follows:

"Tax on Personal Property a Lien on Real Property. Every tax due upon *personal* property is a lien upon the *real* property of the owner thereof, from and after twelve o'clock m. of the first Monday in March in each year. (Amendment approved 1880; Code Amdts. 1880 p. 16.)"

At page 16 appellant cites two California cases to the effect that the necessity for collecting revenue imperatively requires that the lien for taxes shall take precedence over other liens. Examination of the opinions discloses the fact that they are street assessment cases in which the State legislatively granted priority.

On the same page counsel cite the Federal case of *Pauley v. State of California,* to the point that in that case the priority of gasoline taxes in a Federal receivership was recognized. Gasoline tax regulations will be found in Act 2964 of Deering's General Laws (1931). Section 4 of that Act states that "the license tax shall be a lien upon all property of the distributor,

attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied upon all property of the distributor, and remaining until the license tax is paid or the property sold in payment thereof". The court therefore merely enforced a statutory lien of California.

The specific statutory enactment granting *a general lien on all property for this particular class* of personal property (license) tax, is another illustration of the lack of legislative intent in California to recognize a general lien upon all personal property of the taxpayer as security for personal property taxes in general. The granting of priority to taxes as against general creditors in payments from general assets, is in legal effect the enforcement of a general lien upon all personal property for the payment of personal property taxes in general.

Another indication of lack of intent to recognize a general priority for personal property taxes, or a general lien therefor against personal property at large, is found in the statute governing the payment of claims in probate estates. There is no provision for priority of unsecured taxes.

Section 950 of the Probate Code provides that debts of the deceased shall be paid in the following order: expenses of administration, funeral and last illness; family allowance; debts having preference under *laws of the United States;* wages; mortgages and other liens in order of priority; judgments in order of date and, finally, "all other demands". Personal property taxes secured by lien on real estate under Political

Code 3717 are covered by the provision for payment of mortgage and other liens; there is no provision for a general priority for taxes, and the provision for priority for debts having preference by law is restricted to the laws of the United States. The subdivision governing mortgage and other liens provides for payment in order of priority out of the proceeds of the encumbered property, and stipulates that any deficiency shall be "classed with the general demands against the estate".

The very code section upon which appellant relies displays upon its face an intention to restrict liens to those declared by statute, and to refrain from a general lien for taxes against personal property at large. Political Code Section 3716 reads as follows:

> "Tax Liens. Every tax has the effect of a judgment against the person, and *every lien created by this title* has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof; * * *"

It will be noted that taxes generally are declared to have only the effect of a judgment, and that only taxes which are in that chapter declared to be a lien have the effect of an execution duly levied, which in effect is merely a duplication of the declaration that they constitute a lien. The only lien created by the title in question, so far as applicable to this litigation, is the lien of personal property taxes upon real estate. Confirming this construction of the section; taxes in gen-

eral are declared to have the effect of a judgment against the person. A judgment against the person by proper proceedings will constitute a lien upon *real estate,* but the only manner in which a judgment can be collected from *personal property* is through a direct levy by the sheriff or other executive official.

The California rule under which only statutory tax liens are recognized is again illustrated by an opinion of the District Court of Appeal which in construing tax liens of the City of Escondido, said:

> "The general rule is that taxes are not a lien unless expressly made so by statute (Cooley on Taxation, p. 865), and the time when the lien will attach, if at all, must be determined by the statute." .
>
> *Escondido v. Escondido Lumber Co.,* 8 Cal. App. 435, 439.

In another California case the Supreme Court say:

> "A lien for unpaid taxes or assessments is generally held to be superior to all contract liens, whether prior or subsequent in time. But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority. (37 Cyc. 1143.) The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appear by reasonable inference from the provisions of the act. *But the authorization for displacing the earlier lien must, under all the decisions, be found in the statute.*"
>
> *Guinn v. McReynolds,* 177 Cal. 230, 232.

The Federal Court for the Southern District of California recently held that unsecured personal property taxes are allowable by a receiver only as a general claim and have no preferential rights.

Damm v. U-Save Holding Corporation, 58 Fed. (2d) 416.

See also:

City of Richmond v. Bird, 219 U. S. 174;
Aetna Casualty & Surety Co. v. Bramwell, 12 Fed. (2d) 307.

At page 17 appellant also cites *Adair v. Beverly Hills Petroleum Corporation* to the effect that personal property taxes have priority over the claims of general creditors. An examination of the opinion discloses that in that case it appeared that the receiver had sold the assessed property, thereby preventing statutory distraint.

Under the next heading (page 18) appellant cites authority that the Federal Court must recognize the priority of the tax lien which exists under the State law. We do not dispute that point, but we urge that before the Federal Court can recognize priority of personal property taxes against general assets, it must be established that under California law such a priority exists.

At page 19 there is a quotation from *Board of Commissioners v. Bernardin* to the effect that personal property taxes should be paid before general creditors. The quotation is based upon the fact that under the State law personal property taxes are not

given a prior lien on real estate. In California a prior lien on real estate exists.

As already indicated, and as conceded by appellant, the extent of priority lien granted to the State for taxes is exclusively a matter of local law. In California the rule is definitely settled that equity receiverships of the character of the present action are not recognized, and that a receivership remedy is available only as an incident to other relief. If California does not recognize jurisdiction for equitable receivership, it is rather difficult to say that *under California law* the State, in a receivership which the State does not recognize, has a prior lien against general assets for payment of taxes in preference to general creditors.

> *Hobson v. Pacific States Mercantile Co.,* 5 Cal. App. 94.

In conclusion upon this point, appellant states that the County by virtue of the prerogative right conferred upon it by local law is entitled to priority over general creditors. We submit that no such priority *by local law* has been established and that it definitely appears that the policy of California is to the contrary; that California asserts no prerogative right for the collection of taxes, except as that prerogative lien is declared in legislative enactment.

IV.

TAXES ASSESSED DURING RECEIVERSHIP ARE NOT A RECEIVERSHIP EXPENSE.

Appellant (brief page 21) relies upon Section 3647 of the Political Code of California as support for its contention that taxes on personal property during the receivership are an expense of receivership. The section provides that "money and property in litigation in possession of a * * * receiver *must be assessed* to such * * * receiver, and the taxes be paid thereon under the direction of the court".

Apparently appellant overlooks the plain statutory mandate that the taxes shall be assessed to the receiver and that in this case the taxes were assessed to Harris Harvester Company and that through the assessment to Harris Harvester Company a lien was obtained upon the real estate of Harris Harvester Company sufficient to insure payment of the tax. While we do not find in the record a specific statement of the negative fact that the taxes were *not* assessed to the receiver, it is obvious from the record that the assessment was made to Harris Harvester Company, and we do not believe that either the solicitor or counsel for appellant will, as officers of this court, contend that the assessment in fact was against the receiver, as distinguished from Harris Harvester Company. The claim presented by the County studiously avoids mention of the party against whom the assessment was made (Trans. pp. 35-41). There is a similar omission in the resolution adopted by the Supervisors but the third recital in that resolution recites indebtedness to the County for taxes for the years in question on the

part of "Harris Harvester Company and/or Edward F. Harris" as receiver. The resolution which follows the recitals directs the institution of suit against the two Companies and the receiver (Trans. pp. 42-44). Both the resolution of the Supervisors and the admission of the attorneys for the County in the lower court (Trans. pp. 45, 46) recite the existence of a lien against the real estate of Harris Harvester Company. Such a lien can exist only in the event the taxes were assessed to the Harvester Company as distinguished from the receiver. Taxes which are assessed against one taxpayer are not a lien against real property of another taxpayer. Moreover, the burden is upon the County as a claimant to affirmatively establish its right of recovery. One condition of the right of recovery from the receiver, as distinguished from the Company, is the stipulation of Political Code 3647 that the taxes shall be assessed to the receiver; there is no showing in the record to sustain this burden of proof of the condition precedent that the taxes shall be assessed to the receiver per Political Code 3647. On the contrary, the County asserts a lien against the real estate, a necessary condition precedent to which is the assessment of the taxes against the owner of the real estate. This burden of proof is supplemented by the fact that upon an appeal every intendment is in favor of the order of the lower court.

Having disregarded the mandate of the political code that personal property taxes for property in the possession of the receiver shall be assessed to the receiver, and having, on the contrary, assessed these taxes to the Harris Harvester Company, and thereby

obtained a lien against the real estate of the Harris Harvester Company, the County is in no position to claim that the taxes are collectible from the receiver as an expense of his receivership. The County elected to proceed against the Company and thereby to obtain a lien upon its real estate; it cannot blow both hot and cold and now claim the benefits as an expense of receivership of taxes from an assessment which might have been, but were not, levied against the receiver.

Only two California cases are cited upon this point (Brief pp. 22, 23); one a decision of the United States Supreme Court, and the other a decision of the Supreme Court of California. An examination of the record discloses that in both of these cases the taxes were assessed to the receiver. (See top of page 393 of the opinion by the United States Supreme Court and page 700 of the opinion by the Supreme Court of California.)

The situation is analogous to collection of purchase price under a sale made during the receivership. If the sale is made to the receiver, it is an expense of receivership and as such the purchase price is payable by the receiver as a preferred claim. If the seller chooses to ignore the receiver and make a sale directly to the Company, as distinguished from the receiver, the purchase price is an ordinary obligation of the Company and is not a preferred claim. The California statute prescribes the method by which personal property taxes may be collected from the receiver as a receivership expense, namely, an assessment against the receiver as distinguished from the litigant.

V.

CLAIM FOR TAXES ACCRUING PRIOR TO THE RECEIVERSHIP ARE BARRED BY THE STATUTE OF LIMITATIONS.

At the outset appellant (Brief pp. 30, 31) cites two California cases and a number of cases from other jurisdictions to the point that taxes for 1931-32 and subsequent years are not barred because a claim was presented on November 3, 1934; it being contended that this is within the three year limitation prescribed by the California statute and that the limitation runs from the date of delinquency. Obviously, decisions from other jurisdictions are not in point if the California courts have passed upon the period of limitation; tax rights and their enforcement being a matter of local law. Both of the California cases cited determine that the limitation upon a personal action for recovery of taxes is three years, but neither of them determines the date from which that limitation runs. However, in a very recent decision by the District Court of Appeal of California in which a hearing by the Supreme Court was denied, that court decided that the period of limitation "must be calculated from the date when the cause of action accrues" and that "the cause of action must be held to have accrued not later than the first Monday in July, 1930".

> *County of Los Angeles v. Los Angeles Junk Co.*,
> 8 Cal. App. (2d) 136, 137 (1).

The first Monday of July is the commencement of the fiscal year and, as applied to the taxes for 1931-32, is the first Monday in July of 1931. The first presentation of any claim by the County was November

3, 1934, being more than three years after the accrual of the claim for taxes for that year. It follows that unless the statute has been tolled, a right of action for taxes for 1931-32 is barred by the statute of limitations even though the presentation of a claim be deemed the equivalent of a suit for the purpose of preventing the bar of the statute.

Appellant's authorities to the point that the presentation of a claim is the equivalent of suit for the purpose of preventing the bar of the statute are found at page 31 of the brief, and all of them are from other jurisdictions, although the question of the statute of limitations, like other tax matters, must be determined from the local law of California. Moreover, none of these cases reach the point.

In *Commissioner v. Bristol,* the claims were presented in the course of the statutory liquidation of an insurance company.

In the cases of *St. Louis Union Trust Company v. St. Louis & S. F. Railway and v. Missouri Pacific Railway,* the debts in question were incurred by the receiver himself, and had been approved by him and allowed by the Master. Both actions were foreclosures of railroad mortgages in which a receiver had been appointed to operate the road; obviously, such an allowance and approval tolls the statute by analogy to a written acknowledgment of indebtedness by an ordinary debtor.

Potts v. St. Paul Assn. is a case in which the plaintiff brought suit to sequester property of the defendant for the satisfaction of plaintiff's debt. The statu-

tory limitation involved, concerned only the claim of the plaintiff, and again it seems obvious that such a suit was a suit for the enforcement of the debt, which necessarily tolled the statute.

The remaining case of *Lacey v. Newcomb* involves a statutory assignment for the benefit of creditors in which the statute required the filing of claims with the assignee. It is elementary that the filing of claims with a trustee in bankruptcy or an assignee for the benefit of creditors under a statutory liquidation tolls the statute.

None of these cases, however, satisfies the contention that an equity receivership which is for the purpose of conducting business and not for liquidation purposes, and which is not recognized by the law of the local jurisdiction, tolls the statute as to a claim whose enforceability rests exclusively in the law of the local jurisdiction. We have already mentioned the fact that in California equity receiverships of the type here involved are not recognized and are not deemed within the jurisdiction of a court of equity.

> *Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94.

It is further contended that the statute of limitations is tolled because the property was in *custodia legis* and that a receiver cannot be sued without leave of court, it being stated that this situation is the equivalent of an injunction against suit. Again we say that the limitations are to be determined by the law of California and that only those matters will toll the statute which are recognized by California law.

It is true that C. C. P. 356 of the Code of Civil Procedure of California provides that the time during which commencement of an action is stayed by injunction or statutory prohibition, is not part of the time limit for the commencement of an action. However, that rule has no application to the present receivership. The California cases cited by counsel (p. 32) are cases in which an injunction had been issued. The order appointing the receiver does not (unlike many similar orders) enjoin the prosecution of actions against the Company. It is a naked appointment of receiver. The printed record does not show matters which were eliminated from the order; the fact, however, is that the order as presented to the court contained such an injunction, and that the provisions for injunction were stricken from the order upon its face by the District Judge, before the order was signed. If it be deemed material, we respectfully suggest that this court of its own motion in justice to the trial judge, require the presentation for inspection by this court of the original order, which will disclose the cancellation of this provision.

It is also true that a receiver cannot be sued without leave of court, but this mere fact is not the equivalent of an injunction and does not toll the statute during the period of receivership. Again, the California rule controls as to the period of limitation upon actions for the enforcement of personal liability for taxes. The California courts have held that pendency of a receivership does not toll the statute of limitations; that the creditor's remedy is by application to court for

leave to sue, and that he cannot postpone the running of the statute by delaying application for such leave of court.

People v. Calif. Safe Deposit & Trust Co., 41 Cal. App. 727.

While the rule in other States is not material, apparently the same rule prevails in other jurisdictions. The Massachusetts case cited by appellant as its leading authority upon another point (Brief p. 31) so holds.

Commissioner of Insurance v. Bristol Mut. L. Ins. Co., 279 Mass. 325, 181 N. E. 208.

In California these statutory periods of limitation apply to actions by the State, which necessarily includes an action to enforce personal liability for taxes.

C. C. P. 345.

It is suggested that because the Harris & Mitchell claim for labor and materials furnished the receiver was allowed by the court, it necessarily follows that the County's claim for taxes must be allowed. It is self evident that the two claims are distinguishable. *If* the County's claim for taxes accruing subsequent to the receivership is a receivership expense, it is also self evident that it is entitled to payment as a preferred claim to that extent; *but* it must first appear that it is a receivership expense.

Under point (B) at page 33, a number of authorities are cited to the point that the institution of the receivership proceedings tolled the statute during the pendency of the receivership proceedings. One answer

to this is that the cases cited are liquidating receiverships and not receiverships for the conduct and preservation of the business. The second and more conclusive answer, however, is that all matters relating to the enforcement of State taxes, whether as to limitations upon actions, right of personal action, prerogative lien, or otherwise, are matters of local concern and that the State law controls. As already indicated, it is the law of California that the pendency of a receivership does not toll the statute, and that the general periods of limitations are applicable to actions to enforce personal liability for taxes.

> *People v. Calif. Safe Deposit & Trust Co.*, 41 Cal. App. 727;
> *C. C. P.* 345.

VI.

THE BAR ORDER OF THE DISTRICT COURT PRECLUDES THE COLLECTION OF TAXES WHICH ARE NOT AN EXPENSE OF THE RECEIVERSHIP.

Admittedly no claim for taxes was presented during the period of limitation prescribed by the order of the District Court requiring presentation of claims. Insofar as taxes are an expense of receivership, the bar order necessarily does not apply. However, we believe that it already sufficiently appears that none of the taxes are an expense of receivership, and in any event, the only taxes which can be regarded as an expense of receivership are the 1932-33 and subsequent taxes. While the 1931-32 taxes cover the fiscal year com-

mencing on the first Monday of July, 1931, they accrued and became a lien as of the first Monday in March, 1931, which was prior to the receivership. A claim which accrued and became a lien prior to the receivership is not an expense of receivership. We have also suggested that taxes which accrued subsequent to the receivership were assessed to the Company and not to the receiver, in the face of the fact that the statute permitted assessment against the receiver, and that under these circumstances the County must look to its lien upon real estate which it acquired by virtue of its assessment against the Company.

People v. Irving Trust, decided by the United States Supreme Court, is cited at page 37 as an authority that the bar order does not apply to governmental agencies unless expressly named. An examination of the opinion, however, discloses the fact that the reason for naming the governmental agency in the order in question was because it was the only claimant sought to be barred. The opinion does not establish the rule that a general bar order is ineffective against governmental agencies in the absence of specific mention of that fact.

Again, the California rule applies to the enforcement of local tax rights. Prerogative liens as a sovereign right are prescribed by the California statute, including the right of distraint and a general lien upon real estate. Insofar as personal liability in a civil action is concerned, it is the apparent policy of the State to place the governmental agency on a parity with private plaintiffs. This is illustrated by the rule

previously noted that the general periods of limitation apply to the State in the same manner as individuals, and that the courts of California hold that the enforcement of personal liability for taxes falls within this rule. It is further illustrated by the fact that in probate proceedings no priority is given to general claims for taxes. If it be the policy of California to place the enforcement of personal liability for taxes in the same category as the enforcement of claims by private individuals, there appears no sufficient reason for exempting the State from the bar of the order made by the District Court, even if it be assumed that under other circumstances such an order is not effective unless the governmental agency be specifically named.

Cases in which the *statute of limitations* is held to be ineffective unless the State is specifically named, are not applicable. The underlying reason for that rule is that statutes of limitation are imposed by the State, and that in the absence of specific language, no governmental agency will be deemed to have imposed restrictions upon its own sovereignty.

It is also suggested that notwithstanding the bar order, a claim is in time if it is presented before the actual disbursement of funds by the receiver, upon the theory that no injury is suffered by the receiver by reason of the delay. Assuming the correctness of that rule, the County has failed to bring itself within the reason of the rule. Assuming, but not conceding, a prior right on the part of the County, if the County's claim had been diligently presented within the time

prescribed by the court, the intention to enforce personal liability in lieu of the lien upon the real estate would have been called to the attention of the receiver, and through him to other parties concerned. At the bond foreclosure sale the real estate was sold upon the theory that the taxes were a lien upon the real estate and that the purchaser taking title subject to that lien must treat them as a part of the purchase price. If it had appeared that the situation was otherwise, that the taxes were to be enforced as a personal liability and that the purchaser of the real estate would take title free from tax liens, a materially different situation would have been presented to bidders, with consequent resulting advantage to the receiver and the Company through the corresponding reduction in deficiency liability. In the present situation, if the County's contention be correct, the full amount of the taxes are to be paid from the receivership estate but the receivership loses the advantage of the increased sale value of the real estate through its freedom from tax liens.

CONCLUSION.

It is respectfully submitted that California law contemplates no general lien for personal property taxes against personal property at large, and therefore that a claim for taxes is not entitled to priority against general assets; that even if such priority be conceded, all taxes accruing prior to 1932-33 are barred both by the statute of limitations and by the bar

order of the District Court; that the presentation of a claim is not the equivalent of suit for the purpose of tolling the statute; that the pendency of receivership proceedings does not toll the statute under California law; and that fundamentally there is no equity in the claim of the County when it now seeks without designating the specific amount unpaid, to twice collect the same taxes from different parties, and where, if collected, the result will be either unjust enrichment of the County or unjust enrichment of the purchaser at the foreclosure sale, and in either event at the expense of the general creditors whose rights the receivership was designated to conserve.

Dated, San Francisco,
September 11, 1936.

Respectfully submitted,
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